

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:F:HAR:POSTF-138411-02
SCBest

date: August 30, 2002

to: Chip Gough, TEFRA Coordinator, Area 1, CT-RI

from: Associate Area Counsel, LMSB, Area 1, Hartford, Ct

subject: [REDACTED]
Validity of a Form 872-P

This memorandum responds to your request for advice regarding the validity of a Form 872-P secured from the above-named taxpayer. This memorandum should not be cited as precedent.

ISSUES

1. Whether the insertion of April 15, [REDACTED] (the due date of the [REDACTED] Form 1065), rather than December 31, [REDACTED], on a Form 872-P (Consent to Extend the time to Assess Tax Attributable to Items of a Partnership), invalidates the Form 872-P? **UIL Nos. 6229.02-00; 6501.08-17.**

2. Whether the failure to provide the taxpayer with written notice of its rights required by I.R.C. § 6501(c)(4)(B)¹, including the right to refuse to sign the 870-P, invalidated the consent? **UIL No. 6229.02-00**

3. Whether for purposes of soliciting and executing the Form 872-P, the Revenue Agent correctly determined that [REDACTED] was the proper Tax Matters Partner (TMP) of the taxpayer for the taxable year ending December 31, [REDACTED]? **UIL Nos. 6229.02-00; 6231.07-00.**

CONCLUSIONS

1. No. The insertion of the April 15, [REDACTED] due date, rather than December 31, [REDACTED] on the Form 872-P, was an inadvertent mistake and does not invalidate the Form 872-P, because the

¹ Unless otherwise noted, all statutory references are to the Internal Revenue Code in effect during the years at issue.

parties clearly knew that the extension related solely to the [REDACTED] taxable year.

2. No. Given the facts of this case, including the taxpayer's representatives' knowledge of the tax laws, we believe that the failure to provide the taxpayer with written notification of the information required by section 6501(c)(4)(B) does not invalidate the Form 872-P.

3. Yes. We believe that the Revenue Agent correctly determined [REDACTED] as the TMP under the largest profits interest rule.

FACTS

A. General

[REDACTED] (or taxpayer) is an unincorporated association formed under [REDACTED] law, that files a partnership return, Form 1065. Prior to [REDACTED] the partnership consisted of [REDACTED] partners, including [REDACTED] who were [REDACTED] corporations [REDACTED]. The principal purpose of the partnership was [REDACTED]

[REDACTED]

[REDACTED]

Effective [REDACTED], the members of [REDACTED] (ceding members) sold their interests in the [REDACTED] contracts to [REDACTED] Corp. ([REDACTED], a subsidiary of [REDACTED] Corporation, and [REDACTED] for a purchase price of \$[REDACTED]. The new owners [REDACTED] in effect on [REDACTED], arising from events occurring on or after that date. [REDACTED] and [REDACTED] purchased interests of [REDACTED]% and [REDACTED]%, respectively, and established a new joint venture with a separate EIN, which is expected to report income and losses on all transactions from [REDACTED] forward. Accordingly, effective [REDACTED], [REDACTED] ceased active business operations. Before the purchase, the three members with the largest profit sharing interest in [REDACTED] were [REDACTED], [REDACTED], and [REDACTED], each holding [REDACTED]%, respectively.

B. Filing of original and amended Forms 1065

On or about April 15, [REDACTED] filed its original Form 1065 for [REDACTED], signed by a [REDACTED], showing an ordinary loss of (\$ [REDACTED]) comprised of [REDACTED] on [REDACTED] in effect prior to [REDACTED]. The loss was allocated among the [REDACTED] ceding members on a contract by contract basis. Except for [REDACTED], the Schedules K-1 attached to the return reflected end of year profit sharing, loss sharing and ownership percentages for all partners as [REDACTED]. [REDACTED] was listed as having an end of year profit sharing, loss sharing and ownership percentages of [REDACTED]% (the ownership in the on-going business after the purchase). The Schedules K-1 listed all members as general partners, but failed to designate a TMP. [REDACTED] did not show in what capacity he signed the return, but apparently, he served as Controller of [REDACTED].

On [REDACTED], the taxpayer filed an amended return signed by [REDACTED], reducing the loss by \$ [REDACTED] to (\$ [REDACTED]). Amended Schedules K-1 were prepared for each partner reflecting changes to each partner's distributive share of the loss as reported on the original Form 1065. However, the end of year profit sharing, loss sharing and ownership percentages remained as reported on the original Form 1065.

C. The Service's audit of the original and Forms 1065

In [REDACTED], the Service selected the original and amended Forms 1065 for examination. On [REDACTED], the revenue agent mailed a letter addressed to "[REDACTED] or Tax Matters Partner, [REDACTED]", scheduling the first audit appointment for [REDACTED] relating to the [REDACTED] Form 1065. By memorandum dated [REDACTED], the revenue agent notified [REDACTED] that under section 6231(a)(7), it was "nominated" as the TMP for the taxpayer. On the same date, he issued a Notice of Beginning of Administrative Proceeding (NBAP) to [REDACTED] for the [REDACTED] taxable year.

From [REDACTED], the revenue agent issued several IDRs to [REDACTED]. On [REDACTED], the revenue agent issued two Forms 5701 (Notice of Proposed Adjustments) to the taxpayer proposing (1) accepting the reduced loss on the amended return as filed and (2) capitalizing legal expenses that were fully deducted on the return relating to the [REDACTED] purchase. On or about [REDACTED], [REDACTED] signed the Forms 5701 agreeing to the proposed adjustments. It appears that thereafter, the revenue agent requested the help of an International Examiner to assist him in reviewing a potential international issue appearing on the [REDACTED] Form 1065.

Although the exact date is unclear, apparently sometime in [REDACTED], the revenue agent prepared and solicited a Form 872-P from [REDACTED] seeking to extend the statute for the [REDACTED] Form 1065 until December 31, [REDACTED]. When the agent prepared the Form 872-P, he listed the tax period ended as April 15, [REDACTED] the due date of the [REDACTED] return, instead of the actual year ended of December 31, [REDACTED]. Further, there is no written documentation that at the time he solicited the signing of the Form 872-P, the revenue agent provided [REDACTED] with the written notification of the taxpayer's rights as required by section 6501(c)(4)(B). However, the revenue agent insists that he orally communicated the required notification to the representatives of [REDACTED].

On [REDACTED], a [REDACTED] signed on the line designated for "Tax Matters Partner" on the Form 872-P. On [REDACTED], the revenue agent issued a memo to [REDACTED], [REDACTED]'s Director of Corporate Tax, requesting her to fax him the name and title of the person signing the Form 872-P. Apparently, [REDACTED] questioned the agent's determination of [REDACTED] as TMP, since he also notified her in the memorandum that he made the determination based on [REDACTED]'s [REDACTED] year-end ownership interest reflected on the Schedule K-1. On [REDACTED], [REDACTED] responded by memorandum that [REDACTED] was the "Sr. VP, Treasurer & CFO" of [REDACTED]. On [REDACTED], an acting Team Manager executed the Form 872-P for the Commissioner extending the statute until December 31, [REDACTED].

On [REDACTED], the revenue agent sent a copy of the signed consent to [REDACTED] at [REDACTED], including a cover letter using the tax period of April 15, [REDACTED]. Neither the agent, [REDACTED], nor the acting Team Manager questioned the insertion of the erroneous tax year ending April 15, [REDACTED].

On [REDACTED], [REDACTED] as TMP for [REDACTED] signed a Form 4605 agreeing to the adjustments. Thereafter, the case was forwarded to Quality Review for preparation and issuance of a Notice of Final Partnership Administrative Adjustment. Because of the previous agreements to the adjustments by [REDACTED] and [REDACTED] the Reviewer does not expect [REDACTED] or many of the other partners to contest the adjustments. However, he is concerned with the validity of the Form 872-P if a petition is timely filed contesting the adjustments in the proposed FPAA.

DISCUSSION

1. Use of due date of April 15, [REDACTED] on the Form 872-P

As executed, the Form 872-P incorrectly reflects April 15, [REDACTED], as the taxable period ended, rather than December 31, [REDACTED]. The taxpayer did not file a tax return for a period ending April 15, [REDACTED]. Further, there is no question that the taxpayer and its representatives understood that December 31, [REDACTED] was the only year under examination. All the other relevant notices to the taxpayer, including the first appointment letter, the NBAP, the Forms 5701 and the Form 4605 clearly reflect December 31, [REDACTED] as the taxable year under examination. Accordingly, we view the insertion of the April 15, [REDACTED] due date as an inadvertent mistake that does not invalidate the Form 872-P. Buchine v. Commissioner, 20 F.3d 173 (5th Cir. 1994)

2. Section 6501(c)(4)(B) notification

Section 6501(c)(4)(B) provides that the Service shall notify the taxpayer of its right to refuse to extend the period of limitations, to limit an extension to a particular issue or issues, and to limit the extension to a particular time period. Further, the statute prescribes that such notice must be given each time the Service requests an extension. The legislative history underlying this provision reveals that Congress was concerned that, in some cases, taxpayers had not been fully aware of their right to refuse to extend the period of limitations, and taxpayers felt that they had no choice but to agree to extend the period of limitations upon the request of the Service. See H.R. Conf. Rep. No.105-599 at 286 (1998). To comply with section 6501(c)(4)(B), the Service requires its agents to include Letter 907 (DO) and Publication 1035 when soliciting the proposed consent. Further, the Service employee requesting the consent must document on Form 9984 in the case file that the required notification was made and must maintain a copy of the Letter 907(DO) in the administrative file. IRM 121.2.22.3, Statute of Limitations Handbook.

Section 6229(b)(1)(B) allows the TMP or any other person authorized in writing by the partnership to extend the period of limitations with regard to all partners. On its face, section 6229(b)(1)(B) does not mention that it requires notification similar to rights required by section 6501(c)(4)(B). However, the Service's position is that because the period of limitations under IRC 6229 merely supplements the section 6501 period of limitations, we must comply with 6501(c)(4)(B) when soliciting section 6229 extensions.

The administrative file, including the agent's activity record, does not reflect that he notified the taxpayer of its rights accorded by section 6501(c)(4)(B) or included Letter 907 or Publication 1035 when he solicited the Form 872-P. The agent orally told the Reviewer that he mailed the documentation, but could not explain why a copy of the Letter 907(DO) was not in the file.

Although we do not condone the agent's failure to document the administrative file, we agree with the Reviewer's conclusion that under the facts of this case, the taxpayer, through its representatives, were fully aware of its rights regarding extensions. The agent solicited and negotiated the signing of the Form 872-P from [REDACTED] VP, Treasurer & CFO of [REDACTED] and [REDACTED] Director of Corporate Tax of [REDACTED]. Both of these individuals are professionals employed by a large corporation to handle complex tax matters, and, in our view do not fall under the category of taxpayer section 6501(c)(4)(B) was enacted to protect. Accordingly, based on the agent's oral representations that he provided the notice and the taxpayer's knowledge of its rights, we view the agent's failure to document the notification as a technical violation that does not invalidate the Form 872-P.

3. Proper TMP

The taxpayer fail to designate a TMP on the [REDACTED] Form 1065. Relying on the largest profits interest rule of section 6231(a)(7)(B), the agent determined, based on the Schedules K-1 as filed, that [REDACTED] was the proper TMP because its year-end profit interest of [REDACTED]% was greater than the year-end profit interest shown on the Schedules K-1 of any other partner. The Schedules K-1 for all other partners reflected [REDACTED]. Thus, [REDACTED] was the only general partner that had [REDACTED] profit sharing percentage showing on the Schedules K-1 at the end of the year.

The Reviewer raises a concern about [REDACTED]'s determination, because as reported on the Schedules K-1, the year-end profit percentages only add up to [REDACTED]%. Thus, he is unsure whether the agent should have used the largest profits interest rule in determining that [REDACTED] was the proper TMP. Admittedly, the facts here are unique, and we agree with the Reviewer that it would have been more prudent for the agent to seek guidance as to a determination of the proper TMP. Nevertheless, the agent's determination of [REDACTED] as TMP complied with the specific requirements of Treas. Reg. § 301.6231(a)(7)-1(m)(2). This section provides that the largest profits interest is determined based on the year-end profits interest reported on the Schedules K-1 filed with the Form 1065 for the taxable year for which the

determination is being made. Here, there is no question that the taxpayer reported that [REDACTED] was the general partner possessing the largest year-end profits interest. Thus, we believe that the Service possesses a sound basis for determining that [REDACTED] was the proper TMP under the largest profits interest rule.

The Reviewer posits that a argument can be made that the doctrine of implied ratification might be applicable if the taxpayer ever contends that [REDACTED] was not the proper TMP. See, e.g. Mishawaka Properties v. Commissioner, 100 T.C. 353 (1993). However, in our view, we would need to develop additional facts to determine whether this doctrine is applicable.

In summary, we acknowledge that the solicitation and securing of the Form 872-P was done in a some-what sloppy manner. However, we believe that none of the defects rise to a level that would invalidate the Form 872-P. Therefore, we believe that the taxpayer and the Service entered into a valid consent extending the period of limitation for the Form 1065 for [REDACTED] until December 31, [REDACTED].

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If disclosure becomes necessary, please contact this office for our views.

We are closing our file. Please contact Stephen C. Best at (860) 290-4077 with any questions.

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By: _____
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